

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1454

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Appellee,

-against-

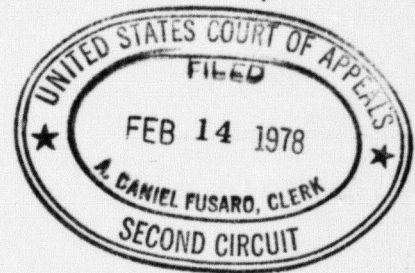
ROBERT McGRAY,

Appellant.

-----X

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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CASES CITED

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McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441,
25 L.Ed. 2nd 763 (1970)

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55,
77 L.Ed. 158 (1932)

Rickenbacker v. Warden, 550 F.2d 62
(2d Cir. 1976)

U.S. v. Tolliver, No. 77-319, 320, slip op. 863
(2d Cir. 1978)

U.S. v. Deaton, 381 F.2d 114 (2d Cir. 1967)

U.S. v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d
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U.S. v. Eliano, 522 F.2d 201 (2d Cir. 1975)

U.S. v. Gerry, 515 F.2d 130 (2d Cir.), cert. denied
423 U.S. 832 (1975)

U.S. v. Yanishafsky, 500 F.2d 1327 (2d Cir. 1974)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
-against- :
ROBERT McGRAY, :
Appellant. :
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STATEMENT OF THE CASE

The appellant Robert McGray was charged, along with five others, in a five count indictment with the crimes of conspiracy to forcibly rob a series of banks (18 U.S.C. 371), robbing a bank on February 9, 1976 (18 U.S.C. 2 and 2113(a)), jeopardizing lives by using a gun while robbing the bank on February 9, 1976 (18 U.S.C. 2 and 2113(d)), robbing a bank on May 6, 1976 (18 U.S.C. 2 and 2113(a)), and jeopardizing lives by using while robbing the bank on May 6, 1976 (18 U.S.C. 2 and 2113(d)).

Upon a trial by jury, wherein only the appellant Robert McGray and co-defendant Charles Williams were defendants on trial, both men were convicted of all five counts. On September 19, 1976, Mr. McGray was sentenced to a total of forty years imprisonment, as follows:

Count One (18 U.S.C. 371)	-	Five Years Concurrent
Counts Two and Three (18 U.S.C. 2113(a) and (d) re: 2/9/76	-	Twenty Years Consecutive
Counts Four and Five (18 U.S.C. 2113(a) and (d) re: 5/6/76	-	Twenty Years Consecutive

At trial, the government presented proof as to three separate bank robberies, two of them within the Eastern District of New York and the subject of the substantive counts and a third bank robbery, on March 11, 1976, of the Kilbourne State Bank in Milwaukee, Wisconsin.

Evidence of the Wisconsin bank robbery, which was the greatest part of the evidence at trial, was offered on the theory of being proof as to the conspiracy charge.

All three bank robberies were committed by men with ski masks over their faces. No victims or witnesses at the scene of any of the bank robberies were able to identify the perpetrators or point to either of the defendants at trial as the bank robbers.

The principal government witness was Curtis King, who was originally indicted on this case and who had pleaded guilty to 18 U.S.C. 2113(a) pursuant to an agreement with the

government (T: 44-45).^{*} At the time he testified, Mr. King was awaiting sentence.

Curtis King testified that he was introduced to Charles Williams, also known as "Chaz", and Robert McGray, who was also charged in this indictment (T: 47).

King said he was invited over to Bell's house and had a discussion about robbing a bank with Bell, "Chaz" and "Sabu". King told the three men that he had experience with armed robbery, that he had no experience with bank robbery, but he had the "will to learn" (T: 50). The three said they would be in touch with him and King then left.

Several days later, "Chaz" and "Sabu" came to King's house in Brooklyn and they explained to King that his role in a bank robbery would be that of a "counter man", that is, one who runs behind the counter and scoops up the money (T: 51). King was told that Mr. McGray was to be the "floor man", the person who "secures" the bank by holding everyone up with a weapon (T: 52). More than one discussion was held (T: 53) and King was taught various techniques, including use of a "flip spot", a get-a-way meeting location,

^{*} "T" followed by a numeral indicates the page of the trial transcript.

use of gear, including arms, ski masks and gloves, and how to distinguish wrap money from bait money (T: 53-54).

Just prior to the February 9, 1976 bank robbery, a meeting of Bell, "Chaz", "Sabu", King and Gary Graham, brought into the group to be a driver, was held. Plans were made and roles assigned (T: 55-56).

Needing a car, "Chaz", "Sabu" and King drove to New Jersey and King stole a four door Plymouth on February 8, 1976 and drove it back to New York (T: 59).

The next day, the five men assembled with the stolen car and two cars of their own and drove convoy-fashion to the flip spot near the European-American Bank on Brush Hollow Road in Westbury (T: 62-63). All of the gear being ready at the direction of "Chaz" and "Sabu", the men put on outer clothes, ski masks, gloves, took a duffle bag and guns and got into the stolen car and drove to the bank (T: 61, 64-65).

The men then committed the bank robbery as per the plan (T: 67). "Sabu" was the first in the bank and had everyone lie on the floor (T: 65). Upon leaving the bank, the men got into the stolen car, stuffed all the gear and money into the duffle bag and drove back to the flip spot where they left

the stolen car, each got into his own car and drove to King's house to divide up the money (T: 79-80).

Lana Bischoff testified that she was an employee at the bank on February 9, 1976 and that she was present during the bank robbery, during which one of the armed men told everyone to stay on the floor (T: 575-577). Renee McCann was a teller at the bank. She heard a voice ordering everyone to the floor. While on the floor, she saw a man with a ski mask (T: 585-587). Robert Cairns was the head teller at the bank and while on the floor, saw a masked man with a shotgun (T: 594-595). He said that \$23,000 was taken (T: 597).

It was stipulated that the car used as the get-away car in this bank robbery was stolen the morning of the bank robbery in front of a local street in Teaneck, New Jersey (T: 606).

George Stevens, a black man employed as a porter by the Westwood Village apartment on Brush Hollow Road in Westbury, a few blocks from the bank, testified that on February 9, 1976, while at work at about 9:00 A.M., he noticed three or four cars of the same general description given by Curtis King come and park near the apartments. He stated he noticed this because the apartment area was a

"white area", in his words and the men who stopped were black men (T: 659-662).

About one month later, King, still living in Brooklyn, got a long distance phone call from "Sabu", who, after a few pleasantries, said to King: "Do you want to go to work?", which King understood to mean did he want to commit another bank robbery (T: 81).

The defendant Williams came on the phone and a discussion was had about another bank robbery with the same people (T: 82). King contacted Bell about this (T: 83). Williams called back in a few days and said "everything would be arranged" and King "didn't have to worry about the plane ticket" (T: 83-84).

Later that night, King got a call from a Theresa Jordan, a friend of Charles Williams, who got airline tickets. Then King, Ms. Jordan and Bell flew to Chicago where they were met at O'Hare Airport by Charles Williams and Robert McGray (T: 84-85).

There followed a great deal of evidence about what the four men, Charles Williams, Ronald Bell, Curtis King, the appellant Robert McGray, and two women friends, did while in

Chicago, while driving around the Milwaukee area for three days and then robbing a bank in Milwaukee, the flights of Curtis King and two women to New York and Williams, Bell and the appellant to Atlanta and Williams' efforts to purchase a Lincoln with \$5,000 in cash in a brown paper bag a day or so after the bank robbery.

In all, out of the twenty witnesses who testified at trial, thirteen of them (including Curtis King, who testified as to all three bank robberies) testified as to the Chicago-Milwaukee-Atlanta trail and events related to this bank robbery, which is not subject to prosecution in the trial court. The evidence of the Milwaukee bank robbery trail constituted the greatest part of the trial below,

Caroline Timms, an auto rental agent in East Point, Georgia, near Atlanta, testified that on February 18, 1976, one Sheila Duhart rented a car which was returned on March 15, 1976. Louis McIntosh was listed as a second driver, When returned, the car showed 6,183 miles driven (T: 482-487),

Lillian Cavanaugh, credit manager of the Sheraton Cadillac Hotel in Detroit, testified that the records show that Louis McIntosh registered at the hotel on February 29, 1976, and that while he was there, calls were made to New York

and Atlanta from that room (T: 680-688).

Dorothy Bennick, employed by National Car Rental at the airport in Detroit, testified that a brown American Motors Matador, Wisconsin license number GH 8718, was noted as missing or stolen on March 4, 1976 and thereafter. The records show that the car was returned on March 11, 1976 by the Milwaukee police (T: 699-712).

Gary Shaffer, a Michigan state trooper, testified that on March 5, 1976, he stopped a Georgia license-plated four door Mercury for speeding and drunken driving and arrested two men who identified themselves as Abraham Williams and Louis McIntosh. In court, he pointed out Robert McGray and Charles Williams, respectively, as the men he arrested (T: 430-435).

Curtis King testified that upon being met at O'Hare Airport in Chicago on March 7, 1976 by Charles Williams and Robert McGray, he went with them to the Hyatt Regency Hotel near the airport (T: 86), where Charles Williams rented two rooms under the name McIntosh (T: 95-96). King recounted that, while at the hotel, there was a fire in one of the two rented rooms, necessitating the payment of \$75 by Charles Williams to the hotel (T: 97).

Daniel Sullivan, working at the hotel then, testified

that the rooms were registered on March 7, 1976 to Mr. Louis McIntosh, that an Abe Williams was also listed as being an occupant, that he heard about a fire in the room from a maid and that he received \$75 from a black man identifying himself as Mr. McIntosh (T: 533-541).

Curtis King testified that everyone went to bed and left the next day, driving to Milwaukee looking for a bank "with a decent flip spot" to rob (T: 88). In all, they spent three days looking for a bank driving around in a Chevrolet and an American Motors car that was "hot" (T: 89, 92).

Curtis King testified that the cars were then driven to a flip spot, where the men "geared up" with bank robbery equipment.

Celia Dobberice, a Milwaukee resident and the wife of a police officer, testified that on that morning, March 11, 1976 at about 8:45 A.M., she was sitting at her dining room table when she saw several cars, similar to the description given by Curtis King, drive up and saw four black men get out, stretch and then one car left (T: 507-512).

Curtis King testified that the bank robbers

drove to the bank in the stolen car and robbed the bank, with "Sabu" securing the bank and Charles Williams and himself as countertermen (T: 94).

Roger Kramer, a vice-president and cashier of the Kilbourne State Bank, Milwaukee, Wisconsin, testified that on March 11, 1976, the bank was robbed of more than \$37,000 and that he saw one of the robbers, who wore bulky clothing, a ski mask and had a gun (T: 472-478). Allan Hackbarth, another vice-president of the bank, testified that he also was present at the bank robbery and saw three men come into the bank (T: 461, 464).

Curtis King testified that, upon leaving the bank, all of the men got into the car and drove back to the flip spot while putting the money and gear into a duffle bag. At the flip spot, the men abandoned the hot car and got into the other cars. Curtis King testified that he jumped into the trunk of one of the cars with the duffle bag (T: 94).

Erwin Meyer, a resident of Milwaukee, testified that he was at home in his apartment building looking out the back door when he saw a tan Matador pull up, three black men get out, two of the men get into the front seat of a blue and white car and one get into the trunk of the car

with a duffle bag and drive off (T: 525-527).

Det. Thomas Langford of the Milwaukee police department testified that on March 11, 1976, investigating the robbery of the Kilbourne State Bank, he went to a local address and spoke with Erwin Meyer, who pointed out the tan Matador. Det. Langford searched the car, found parking tickets from Chicago and an auto rental form in the name of Louis McIntosh (T: 724-732).

Curtis King testified that after about 45 minutes of driving, he got out of the trunk, then he, Mr. Williams, McGray and Bell went to a hotel and divided up the money (T: 95). King and Williams then disposed of the gear (T: 95). Everyone had flight reservations, King, Bell, and two women flying to New York and Williams, McGray and Hairston flying to Atlanta (T: 95).

Booker Brantley, president of a Lincoln-Mercury dealership in Atlanta, testified that a man, who he identified as the defendant Charles Williams, came to his office on March 12, 1976 with Sheila Duhart. The man said he wanted to buy a car in Ms. Duhart's name (T: 760-761). Since the man had no proof of employment, this was done by a lease with a purchase option (T: 756, 760). The man paid \$5,000 in cash which he

took from a brown paper bag (T: 761).

It was stipulated that Mr. Williams was driving the Lincoln Continental in Queens, New York on May 21, 1976 (T: 829).

William Bodziak, an FBI agent, testified that he compared samples of Mr. McGray's handwriting with those of Abraham Williams on the Hyatt Regency Hotel in Chicago and in his opinion, they were written by the same man (T: 798-799).

Curtis King testified that some period of time later, he "reestablished" contact with Mr. Williams and Mr. McGray (T: 104). Mr. McGray called Mr. King and said Mr. Williams was coming back into town. Several discussions were held about committing another bank robbery. The men looked for a week or two for a suitable bank and settled on a branch of the Nassau Savings and Loan Association on Sunrise Highway in Rockville Center (T: 105-107).

King further testified that the men gathered the gear, King stole a car and the men drove three cars to the bank (T: 107). They drove to the flip spot, put on outer clothes and ski masks and took guns in hand (T: 108-109). During the actual bank robbery, Mr. King said Mr. McGray entered first, securing the bank while Mr. King was counterman

and Mr. Williams went into the safe. Both of them got money. Mr. McGray was timing the venture and said "raise", indicating when it was time to go (T: 109-111).

Margaret McDonnell, a teller at the bank on May 6, 1976, the day of the robbery, testified that she saw two of the robbers, both of whom were wearing ski masks. She stated that she was able to see via the opening in the ski masks that both men were black (T: 607-618).

Twenty-five thousand dollars was stolen (T: 622).

Angelo Ferricane, an assistant branch manager, also testified to witnessing the bank robbery (T: 635-638).

Wayne Howard, an employee at an Oldsmobile dealer, was walking into the bank as the three bank robbers were running out. He noticed that the men had ski masks and that one of them was carrying a shotgun (T: 642-644). He saw the men get into a brown Maverick automobile and jotted down the license plate. Later, the FBI showed him the car, which he identified (T: 646).

It was stipulated that the car identified by Mr. Howard as the get-a-way car had been parked by the owner on Clarkson Avenue in Brooklyn on May 5, 1976 and discovered

missing the next morning, the day of the bank robbery (T: 827).

Curtis King testified that he was arrested in November of 1976 on an unrelated charge and about one month later began talking to federal agents about these bank robberies (T: 116-117). He concluded an agreement with the government during January and February, 1977 (T: 127). Mr. King testified to numerous prior convictions (T: 34-36) and prio immoral acts (T: 142, 155, 158).

The above evidence having been presented, the government rested (T: 829).

Three witnesses testified for the defense, all of them called by defendant Williams.

Stacy Fox, an employee of the European-American bank robbed on February 9, 1976, stated that she was present during the robbery and that the robbers seemed more white than black (T: 866).

Alvin Scott, a man serving a lengthy federal sentence for bank robbery himself, stated that he had spoken with Curtis King in the M.C.C. earlier and advised him to falsely implicate the two defendants on trial; but that being a very recent convert to Islam, he now felt honor-bound to reveal this (T: 877-896).

Ernestine Williams, the mother of defendant Charles Williams, also testified (T: 913).

The defendants rested (T: 915).

After summations and charge, the jury deliberated and found both men guilty of all charges (T: 1156).

POINT I

THE APPELLANT McGRAY WAS DENIED
THE EFFECTIVE ASSISTANCE OF COUNSEL.

The appellant Robert McGray was sentenced to forty (40) years in jail.

Any experienced criminal law practitioner would have immediately recognized the potential exposure of incarceration to Mr. McGray in this case and would therefore have presented a vigorous defense.

Mr. McGray's trial attorney, a member of the firm of Cravath, Swain and Moore at the time, and who had never tried a criminal case,* apparently undertook to defend Mr. McGray for experience.

* Mr. James Bing, Mr. McGray's trial attorney, stated to me in a phone conversation on February 3, 1978 that he was a member of the firm of Cravath, Swain and Moore at the time he undertook this case pro bono via an affiliation the firm had with the Community Law Offices, 176 E. 106 Street, New York, New York.

Mr. Bing stated that he had never tried a criminal case prior to this.

Mrs. McGray, the wife of the appellant who 'retained' Mr. Bing at the Community Law Offices, stated to me on February 5, 1978 that Mr. Bing did not tell her that he had never tried a criminal case and that the first time she became aware of this fact was in our conversation on that date.

Mr. Bing is no longer a member of the firm of Cravath, Swain and Moore.

A reading of the trial record reveals a minimal defense, with tardy applications for evidentiary hearings, no opening, virtually no cross-examination, evident lack of preparation, especially as to witnesses, an abdication of the role of defense attorney, no motions at the end of the government's case, and topped off by a summation that takes less than eight pages of the transcript.

This Court has made known its concern about adequacy of counsel and its "promotion of higher standards of advocacy", Rickenbacker v. Warden, 550 F.2d 62, 67 (2d Cir. 1976).

No matter what standard for competency of counsel is adopted, the representation afforded Mr. McGray below was inadequate.

The following recitation of what Mr. McGray's trial counsel did and did not do precedes any further argument.

Beginning on an inauspicious note, Mr. McGray's trial counsel makes a clearly tardy application for a motion to suppress physical evidence (T: 15-17). The jury selection process had already begun. The fact of the seizure and the surrounding circumstances were known to Mr. McGray's trial counsel, as the trial judge elicited. The government opposed

a hearing on the motion.

Some of the colloquy reveals the lack of preparation and understanding of the criminal process (T: 16-17):

THE COURT: But you knew he had it [the seized ski mask]?

MR. BING: Yes.

THE COURT: How long have you known?

MR. BING: Ever since I -- how long has it been?

MR. CARTER:* Ever since the first day you were appointed.

THE COURT: Actually, you've done nothing up to now on any motions to suppress.

MR. BING: I am ready to go on a motion to suppress now.

THE COURT: You knew last week the Court did all the motions to suppress.

MR. BING: I am aware of that.

THE COURT: You knew you were actually on trial?

MR. BING: Yes.

The trial court denied the defense application for

* Zachery Carter, the Assistant United States Attorney who tried the case for the government.

a hearing.*

As the trial began, Mr. McGray's trial counsel waived his opportunity to make an opening statement (T: 31).

The first government witness was Curtis King, the principal government witness who testified at length on direct examination.

The cross-examination of this witness by Mr. McGray's trial counsel (T: 400-419) was brief, replete with objectionable questions, awkward in style and alienating to the Court to the point that it stated it was "not happy" with the clearly improper form (T: 417).

The Court took a recess at that point. Mr. McGray's trial counsel then immediately made an untenable claim that "the Court restrained me in my cross-examination" (T: 420). The Court elicited from Mr. McGray's trial counsel that "no one" told him to stop (T: 420). The Court immediately allowed further cross-examination by Mr. McGray's trial counsel. A reading of the record of that further cross-examination consisting of less than two pages (T: 421-422), reveals that

* It is noted that the government did not, in fact, seek to introduce the seized evidence. The decision not to do so was apparently unrelated to this colloquy and ruling as no further reference to this matter is made in the transcript.

actually, Mr. McGray's trial counsel had no further questions and his claim and sense of restraint apparently sprung from his inability and inexperience, not from lack of material with which to work.*

Of the government witnesses who followed Curtis King, there is virtually no cross-examination in most instances and exceedingly brief and apparently pointless questioning as to the rest.

Mr. McGray's trial counsel asked no questions of Michigan state trooper Gary Shaffer (T: 459), Roger Kramer (T: 481), Caroline Timms (T: 506), Celia Dobberice (T: 523), Erwin Meyer (T: 531), Daniel O'Sullivan (T: 567), Lana Bishoff (T: 584), Robert Cairns (T: 603), Margaret McDonnell (T: 627), Angelo Ferricane (T: 641), Lillian Cavanaugh (T: 698), Dorothy Bennick (T: 714), Det. Thomas Langford (T: 752), and Booker Brantley (T: 768).

Those government witnesses who Mr. McGray's counsel did cross-examine to no apparent point were Allan Hackbarth (T: 470-471), Renee McCann (T: 592-593) and William Bodziak

* This witness, Curtis King, was by far the prime government witness in the entire case. The events he related covered all three bank robberies and many related events, all of which touched on Mr. Bing's client. Mr. King's direct examination covered 78 pages (T: 33-111) and the Court recessed until the next day after Mr. King's direct examination so defense counsel had overnight to prepare for cross-examination.

(T: 804-812).

Other actions which bear on the adequacy of Mr. McGray's trial counsel include the apparent lack of preparation in arranging for an incarcerated defense witness to be brought to court as evidenced by the mid-trial requests to the trial judge to help arrange for it (T: 677-678, 718-723). Included in the latter colloquy is the revelation that Mr. McGray's trial counsel, seeking mid-trial to have a federal prisoner brought to court as a defense witness, does not know what the witness is in prison for.*

A similar lack of preparation is revealed in Mr. McGray's trial counsel's request for the court to "underwrite" the cost of a handwriting expert to testify on behalf of Mr. McGray. The trial judge similarly denied this application. What is noteworthy is the timing of this request, that is, that it is made late in the trial and immediately prior to the government witness who is to testify to his opinion following an examination of Mr. McGray's handwriting. The colloquy clearly shows that Mr. McGray's trial counsel had "been informed some time ago [of] the results of the examination" (T: 790).

* THE COURT: What crime is Mr. Lewis (the federal prisoner sought as a defense witness) in custody for?
MR. BING: I really don't know (T: 722-723).

The trial court notes that the application is "late" (T: 790). It is clear that Mr. McGray's trial counsel was not prepared. The entire colloquy appears at pages 790-791.

This tardy application is repeated and denied again at page 793.

Perhaps more than anything else, the colloquy regarding the perfunctory and time-saving stipulation in bank robbery cases that the banks are federally insured indicates the lack of experience, understanding and preparation by Mr. McGray's trial counsel. It reads as follows:

THE COURT: All right, bring in the jury.

(Whereupon the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. While you were out and while you were awaiting to come into court, the parties were working out certain legal matters concerning this case. And they seem to have worked them out. And the working out of these matters would have the effect of shortening the remainder of the trial time which is required for this case. So I will let Mr. Carter proceed.

Mr. Carter.

MR. CARTER: I'm going to report to the jury and the Court stipulations that have been entered into between the Government and the defendants on trial.

Number one. Both the European-American Bank, located on Brush Hollow Road, in Westbury, New York, and the Kilbourn State Bank, located at 6055 West Lisbon Avenue, Milwaukee, Wisconsin, are insured by the Federal Deposit Insurance Corporation; and the

Nassau Savings and Loan Association is insured by the Federal Savings and Loan Insurance Corporation.

THE COURT: Is that the first stipulation?

MR. CARTER: That's correct.

THE COURT: All right. Mr. Lombardino, is that stipulated to?

MR. LOMBARDINO: It is.

THE COURT: Mr. Bing, is that stipulated to?

MR. BING: That stipulation does not in any way affect my client.

MR. CARTER: One minute.

(Whereupon, Mr. Carter conferred privately with Mr. Bing.)

MR. BING: I object as to Defendant McGray.

(Whereupon, Mr. Carter conferred privately with Mr. Bing.)

THE COURT: Is that stipulated to?

MR. BING: As to jurisdiction, I stipulate.

THE COURT: You agree to that, Mr. Bing?

MR. BING: I agree.

This was in front of the jury. It is difficult to view this as anything but lack of preparation.

The government then rested shortly after this. Curiously, Mr. McGray's counsel made no Rule 29 motion at this point (T: 831-832).

The defense case being about to commence, Mr. McGray's trial counsel asks that the witness Alvin Scott be brought over from M.C.C. (T: 856). When the trial judge asked Mr. McGray's trial counsel what Mr. Scott is in M.C.C. for, he replied "I don't know" (T: 857). It is noted that this refers to an easily accessible person (at M.C.C.) who is about to be called as a witness. Again, it is difficult to view this as anything but lack of preparation.

Mr. McGray's trial counsel then stated that there are other witnesses but he does not have "the full list yet" from his client (T: 857). This is on the eve of the defense case. The statement amounting to a lack of preparation continues as Mr. McGray's trial counsel names a possible defense witness but says he "...[doesn't] know who she is..." and then asks the prosecutor, "Do you know who she is?" (T: 857-858).

After the first defense witness, called by co-defendant Williams finished testifying, the trial judge asked Mr. McGray's trial counsel whom he intended to call as defense witnesses, to which he replied: "I'm about to get a list from my client" (T: 868). Can the failure to discuss with and receive from one's client the list of defense witnesses the client suggests, putting aside for the moment interviewing, considering the value of and preparing the testimony of these

witnesses, prior to the middle of the defense case, be anything but lack of preparation?

As it turned out, Mr. McGray's counsel called no witnesses and presented no defense.

Mr. McGray's counsel made no motion to dismiss upon resting. In the trial transcript, Mr. McGray's counsel made no motion to dismiss the charges at any point. He was, however, late for court, prompting a warning from the court (T: 915-916).

Finally, in a case with more than twenty witnesses and nine hundred pages of testimony and with forty years at stake for Mr. McGray, the summation of less than eight pages of transcript (T: 973-981) was virtually a surrender, not a defense.

The Sixth Amendment to the Constitution guarantees to one accused of a crime the right to counsel. The United States Supreme Court has held this to mean the effective assistance of counsel. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

In 1970, the Supreme Court stated: "It has long been recognized that the right to counsel is the right to the

effective assistance of counsel." McMann v. Richardson,
397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

"[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and...judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."

397 U.S. at 771, 90 S.Ct. at 1449.

This Court, at least up to the present, has maintained the standard derived from Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667, cert. denied 325 U.S. 889 (1945), that being that in order to warrant post-conviction relief, the "lack of effective assistance of counsel must be such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

As this Court noted in Rickenbacker v. Warden, supra, at 65-66, the court that originally articulated the "farce and mockery of justice" standard has now adopted the higher standard of whether the defendant at trial had "reasonably competent assistance of an attorney acting as his diligent conscientious advocate." U.S. v. DeCoster, 159 U.S.App. D.C. 26, 487 F.2d 1197, 1202 (1973). This Court also noted that most other circuit

courts have adopted the higher standard.*

No matter which standard is considered here, Mr. McGray was denied his right to the effective assistance of counsel.

There were many indications of a lack of preparation during the trial. Each one standing by itself is poor. Together they are shocking.

The failure to make a timely motion to suppress noted above was not fatal since the seized items were not offered. But the inexcusable lack of preparation is symptomatic of the preparation and diligence given to the rest of the case.

Evidently, Mr. McGray's trial counsel did not take the time prior to trial to seek out and clarify what witnesses Mr. McGray suggested calling. Good preparation also calls for finding out who these witnesses are, what they are going to say and making arrangements for their presence in court. The record of this trial is an embarrassment as Mr. McGray's trial

* Although not adopting the DeCoster standard, this Court did very recently measure a trial counsel's assistance by that standard in its opinion in U.S. v. Tolliver, No. 77-319, 320, slip op. at 877 (1978).

counsel made applications for witnesses about who, he knew little, some of whom he did not know at all to the point that he had to ask the prosecutor. All of this should have been determined and arranged prior to trial.

Similarly, knowing of a handwriting examination of one's client in advance, to request the trial court to "underwrite" an expert at the last minute late in the trial is inexcusable and reveals a lack of preparation.

There is simply no excuse for the incidents of lack of preparation detailed in the transcript and noted above.

Similarly, the lack of a vigorous* defense presentation is clearly indicated by the failure to make an opening statement, failure to make any motions to dismiss whatsoever and minimal cross-examination.

It is true that Mr. McGray's trial counsel made a disclaimer in chambers with Mr. McGray present, which reads

* Cf. American Bar Association Standards Relating to the Administration of Justice, the Defense Function, Introduction (1974), p. 109: "A lawyer cannot be timorous in his representation."

as follows (T: 837):

(The following took place in chambers.)

MR. BING: I would like to put something on the record, your Honor.

THE COURT: Yes.

MR. BING: The reason why I am not cross-examining witnesses has almost totally been because my client felt that Mr. Lombardino was doing a very extensive cross-examination and there would be nothing to be added to it.

THE COURT: You acted under his direction?

MR. BING: Under his directions that I listened to him. I also concluded for the most part Mr. Lombardino was very thorough and felt what I would add to it would not be very significant.

At the same time, it made my client happy.

THE COURT: That is the way your client wanted it?

MR. BING: Yes.

THE COURT: And that is what he instructed you to do?

MR. BING: Yes.

It is expected that the government responding brief will dwell on this greatly. At the outset, it is noted that Mr. McGray was not present and cannot be said to have acquiesced in this statement.

More fundamentally, even if that were the case, it

is an abdication of the role of an attorney to let the client determine the direction and control of the case except for certain limited exceptions.

The ABA Standards Relating to the Administration of Criminal Justice (1974) make clear the settled rule that the client makes the ultimate decision on three matters, none of them applicable here, and that in all other respects, the attorney has the responsibility and ultimate decision-making power on all other matters, including whether and how to conduct cross-examination and all other strategic and tactical decisions in the trial.

The applicable sections of the ABA Standards make this completely clear.*

* 3.1(b) The conduct of the defense of a criminal case requires trained professional skill and judgment; therefore, the technical and professional decisions must rest with the lawyer without impinging on the right of the accused to make the ultimate decisions on certain specified matters, as delineated in section 5.2.

5.2 Control and direction of the case.

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.

(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

(footnote continued on following page)

A government responding argument to the effect that the abdication of the attorney's function in this case was permissible because it was at the client's direction is not an adequate response in light of the clear standards on division of responsibility between attorney and client set forth.

The minimal summation, it is submitted, cannot be excused on any grounds. There is no argument for length for its own sake here, but certainly it can be said that such a brief summation in so lengthy a case and where the consequences are so great to the accused is virtually a prima facie inadequacy of counsel situation.*

(footnote continued from previous page)

(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation.

* While purely strategic differences cannot be the basis of any contention of inadequate counsel, it is noted that the entire defense on behalf of Mr. McGray was wedded to that of co-defendant Williams. The proof at trial was discernably stronger against defendant Williams than that against defendant McGray. This, perhaps, could have been the basis of a defense where the proof, as a whole, was strong, as here. Yet there was no attempt by Mr. McGray's counsel to distinguish Mr. McGray from Mr. Williams whatsoever, either in cross-examination or in summation.

The jury system is a human system. The summation is an argument addressed to lay people to persuade them, not a stripped down legal argument to a judge where much is unsaid and understood.

Less than eight pages of summation in a case of this length and seriousness to the accused is simply insufficient to involve a jury with the defense argument.

The net effect in this case is that Robert McGray was denied the right to effective assistance of counsel.

It may be argued in response by the government that in the factual setting of this case (since none of the disinterested witnesses aside from State trooper Shaffer could identify Mr. McGray), it was a strategic choice to do little cross-examination and to present a low-key defense; and then cite the general proposition that second-guessing strategic choices is not the basis of relief for claims of ineffective counsel. United States v. Yanishafsky, 500 F.2d 1327 (2d Cir. 1974).

This is a weak position, however, since the failure to be prepared for a motion to suppress cannot be explained away as a strategic choice; the tardiness and failure to ascertain, prepare and arrange before trial for the presence

of witnesses cannot be explained away as a strategic choice; the failure of preparation regarding a handwriting expert for Mr. McGray's defense cannot be explained away as a strategic choice; the failure to make even one motion to dismiss cannot be accounted for as a strategic choice; and, most importantly, the minimal summation should not be whitewashed and cannot, in honesty, be called a strategic choice.

It is likely to be argued in response that the proof of Mr. McGray's guilt is overwhelming and therefore the issue raised here makes no difference. This argument would be not only intellectually dishonest but undermines the basic premise of the system of criminal jurisprudence in this county, that each accused is entitled to the full play of due process and each citizen can rest assured that no man will be sentenced to jail for even a day, no less forty years, without having had a fair day in court, including effective assistance of counsel.

Much has been written and said lately about the necessity for keeping high standards of advocacy in our federal courts.* If this is to have any meaning, situations

* See Kaufman, The Court Needs a Friend in Court, 60 A.B.A.J. 175 (1974); New Admission Rules Proposed for Federal District Courts, 61 A.B.A.J. 945 (1975). Burger, the Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? 42 Fordham L.Rev. 227 (1973).

such as occurred in the trial below must not be allowed to happen.

Here, forty years of a man's life were entrusted to an attorney who had never tried a criminal case before and who presented a minimal defense.*

While it is admirable for persons or organizations, such as large law firms, to offer to do some criminal work pro bono, it is of questionable value in a case such as this. A proper course of proceeding if a large law firm wished to give some pro bono time to doing criminal defense work out of a sense of "duty to the administration of criminal justice" (ABA Standards, The Defense Function, Section 1.5)

* This Court may wish to consider to what extent the trial judge, seeing the minimal representation being given to Mr. McGray from the beginning, had a responsibility to inquire into the circumstances to assure that the defendant was afforded effective assistance of counsel. See ABA Standards, The Function of the Trial Judge, Section 1.1(a).

The record shows that Mr. McGray originally had an appointed counsel and that Mr. Bing came in to replace that attorney. Mr. Bing was not retained, however, and the trial court knew Mr. McGray was an indigent and that Mr. Bing was appearing pro bono.

It is submitted that the trial court has some obligation, especially to an indigent defendant, to insure that he receive effective assistance of counsel. This obligation does not cease merely because an accused avails himself of one attorney who does not charge him (such as Mr. Bing), as opposed to an appointed attorney. The operative factor is that the court has some obligation to see that one who cannot afford counsel receives effective assistance of counsel.

and in hopes of perhaps doing some social good, would be to encourage the actual lawyers, such as the lawyer who tried this case, "to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel" (ABA Standards, The Defense Function, Section 1.5(a)).

It is simply intolerable in our federal courts to allow untried lawyers to gain experience in a serious case such as this and at the price of forty years of another person's life.

POINT II

THE PROOF AT TRIAL FAILED TO SUSTAIN THE CONSPIRACY COUNT. THE CONVICTIONS ON THE SUBSTANTIVE COUNTS SHOULD BE REVERSED AND REMANDED FOR RE-TRIAL IN LIGHT OF THE ADMISSION OF UNDULY PREJUDICIAL EVIDENCE.

The evidence of and surrounding the Wisconsin bank robbery was the greatest part of the trial. Of the nineteen witnesses apart from Curtis King, who testified about all three bank robberies, twelve testified concerning the Wisconsin venture and consequences of it.

All of this evidence was admissable on the theory that it was proof of the conspiracy charge.

It is submitted that a close look at the evidence reveals that there was no conspiracy of an ongoing nature; rather, the evidence shows each bank robbery was a separate discreet event. Should this Court so find, it is then submitted that most, if not all, of the evidence of the Wisconsin bank robbery was unfairly prejudicial in violation of Rule 403 of the Federal Rules of Criminal Procedure.

There was clear evidence below that Curtis King, Charles Williams, Ronald Bell and the appellant Robert McGray

got together and agreed or conspired to rob the first bank, in Westbury, on February 9, 1976.

However, lacking in the proof is any indication that the agreement was to rob several or even one more bank. Similarly, at the end of the first bank robbery, there was no discussion to the effect of "what's next" or "when are we going to do it again" or anything indicating that there would be another bank robbery.

The evidence shows, in fact, that there was a lack of contact among the men until Curtis King received a phone call from the appellant Robert McGray. In this phone call, Mr. McGray asked Curtis King if he wanted to go to work (rob a bank). Certainly, if Curtis King were in an ongoing conspiracy, Robert McGray would not have to ask King if he wanted to go to work, that would be understood.

The fact that Curtis King said yes does not necessarily prove that there was an ongoing conspiracy. It merely proves that Curtis King was willing to do it again.

The key factor is that Robert McGray had to ask Curtis King if he wished to work again. This is consistent with the notion of separate, unrelated bank robberies, rather

than an ongoing conspiratorial agreement.

Similarly, at the conclusion of the second bank robbery, in Milwaukee on March 11, 1976, the participants separated with no plan or discussion or even a hint or suggestion of another bank robbery. This, again, is consistent with the theory of separated, unrelated, sequential bank robberies, rather than three robberies flowing from an ongoing agreement.

More than a month passed after the second bank robbery until Curtis King heard from appellants Williams and McGray again. Finally, contact was "reestablished" (T: 104). This led to discussions, planning and the execution of the third bank robbery, on May 6, 1976, in Rockville Center.

Again, the break of contact, the need to reestablish contact to commit the May 6, 1976 bank robbery tends to indicate that the bank robberies were separate, pick-up events and not part of an ongoing scheme.

Certainly, there is not one piece of conversation in the entire record wherein Curtis King, Charles Williams, Robert McGray, or any of the alleged conspirators speak of being in an ongoing enterprise. It is at best surmise that

the players thought of themselves as in an ongoing agreement, rather than a spontaneous pick-up crew. Moreover, the changing personnel, with Gary Graham, Robert Hairston and Robert Bell playing in and out roles, tends to support the view that these bank robberies were three separate single-shot events, rather than an ongoing conspiracy.

Should this Court adopt this reasoning, it is submitted that the Court should then determine if the admission into evidence of the overwhelming amount of proof of the Wisconsin and related events, which collective proof far outweighed the proof as to the two bank robberies with the Eastern District of New York, was unduly prejudicial and caused unfair spill-over which prevented the jury from making a fair determination on the substantive charges alone.

It is respectfully submitted that, even considering this Circuit's inclusionary form of Rule 404(b), United States v. Deaton, 381 F.2d 114 (2d Cir. 1967), United States v. Gerry, 515 F.2d 130 (2d Cir), cert. denied, 423 U.S. 832 (1975), United States v. Eliano, 522 F.2d 201 (2d Cir. 1975), the sheer volume of evidence of what could be considered proof of similar acts (the Wisconsin bank robbery) would cause some and perhaps all of the proof to have been excluded.

Without going into an exhaustive analysis of just what proof regarding the Chicago-Detroit-Milwaukee-Atlanta trail would have been admissable, it is submitted that clearly not all of it would have been and that the prejudicial effect remains on Mr. McGray from that which was improperly admitted.

It is therefore respectfully submitted that the evidence at trial warrants this Court reversing and dismissing as to the conspiracy count and reversing and remanding for trial as to the substantive counts.

POINT III

THE APPELLANT McGRAY ADOPTS ALL
ISSUES AND ARGUMENTS RAISED BY
CO-APPELLANT WILLIAMS AS IF
FULLY SET FORTH HEREIN.

Pursuant to Rule 28(i) of the Federal Rules of
Appellate Procedure, the appellant Robert McGray adopts
all issues and arguments raised by co-appellant Charles
Williams as if fully set forth here.

CONCLUSION

The judgment of conviction of the appellant
Robert McGray should be reversed.

Respectfully submitted,

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